No. 198

IN THE

Supreme Court,

OF THE UNITED STATES.

OCTOBER TERM, 1926.

JOSEPH SEEMAN, *et al.*,
Petitioner,

—against—

PHILADELPHIA WAREHOUSE CO.,
Respondent.

REPLY BRIEF FOR PETITIONERS.

COHEN, COLE & WEISS,
Attorneys for Petitioners.

SAMUEL F. FRANK,
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POINT I.

The cases cited by respondent (Brief, p. 32) in support of its point that the Circuit Court of Appeals could reverse the verdict of the jury on the facts—despite §879 Judicial Code—do not sustain its contention.

Houghton v. *Burden*, 228 U. S. 161 was an appeal from the decision of the Court without a jury, in a *bankruptcy* proceeding. This Court held, re-

ferring to the bankruptcy statutes and equity rules (at p. 165):

> "*Upon such an appeal* the law and the facts are open for re-consideration." (Italics counsel's.)

At page 164, it expressly indicated that its ruling would have been otherwise had the appeal been taken from the verdict of a jury in an action at law.

Baltimore & Ohio R. R. v. *Groeger*, 266 U. S. 521 was an action for negligence based on the claim that a railroad did not use an improved mechanical device. It was undisputed that the competent engineers of the railroad had exercised their best judgment in retaining the old equipment. This Court held that neither the Court nor the jury could substitute their judgment as to the advisability of using new devices, for that of competent engineers. *No question as to the weight or sufficiency of evidence was passed on.*

Ziang Lung Wan v. *U. S.*, 266 U. S. 1 was a criminal case where a confession was extorted from the defendant and this Court reversed a conviction based upon the evidence so improperly received.

Southern Pacific v. *Poor*, 160 U. S. 438 was another case where the facts were substantially *undisputed;* and this Court held that what constituted negligence was a question for the Court.

None of the cases cited, and no other decision of this Court which we have seen, justified the Circuit Court of Appeals in disregarding the plain

mandate of Section 879 in a case where the acts and *intent* of the parties were to be determined upon conflicting evidence, as in the case at bar.

POINT II.

Respondent's argument that the Circuit Court of Appeals could treat evidence which it considered improbable as no evidence at all (Brief, pp. 14-19) and thus violate the statute by indirection, is wholly untenable.

The authorities cited in our main brief clearly hold that the jury was the proper arbiter to determine whether there was really a loan of money in the present case. Respondent makes no criticism of these cases; but argues that the evidence of the witness McAndrew was highly "improbable" (brief, bottom p. 15); that the Circuit Court of Appeals could therefore ignore it (despite the fact that the jury believed it), and could proceed as if there were *no* evidence on petitioner's part (p. 18). But the probability or improbability of testimony is always a *question of fact*, and peculiarly within the province of a jury.

As was said in *People* v. *Becker*, 215 N. Y., at page 135:

> "The sum and substance of the argument is that it is impossible to believe that Becker would have been so foolish as to order or induce the murder to be committed at a time when he himself would almost

> certainly be the one man in the City of New York who would be suspected of complicity therein.
>
> This was a proper matter to be considered by the jury and we must assume that they considered it. It cannot be laid down as a matter of law that a jury is bound to hold that a specified event has not occurred because the occurrence involves unwise or foolish or blundering conduct on the part of the accused person."

In support of its argument on this point, respondent cites *Houghton* v. *Burden* (*supra*), evidently overlooking the distinction we have pointed out, that *there* the Circuit Court of Appeals was re-considering the *facts* by statutory authority. The case is, therefore, not a precedent here; moreover, the language quoted (*i. e.*, that of Coxe, *J.*, in the Circuit Court of Appeals), was used with reference to an entirely different situation from that in the case at bar.

In that case, a retired business man and accountant made a loan secured by a Fidelity Bond. A condition of the bond required monthly inspection of the borrower's books showing assigned accounts. This work the lender agreed to do for a compensation, which, the District Judge found (p. 171), was a fair return therefor. The borrower testified that no such services were expected, or required; that this agreed compensation was a mere cover for usury, and that the lender had declared this to him in so many words. The Court pointed out that the lender's failure to inspect the books would have voided the bond, and

that the alleged admission that the provision for compensation was a mere device to avoid the usury law, was against the weight of evidence.

In the present case, every probability is that just what McAndrew says, did actually occur. It was perfectly natural for him to ask Cosgrove the purpose of the unusual papers the latter required him to have signed and the circuitous procedure to be followed; what answer could the latter have given than what McAndrew says he made—that they were forms respondent's lawyers had prepared to comply with the law (R., 197). Thus in the case cited, the asserted admission was that the transaction was illegal, while in the case at bar, the statement referred to asserted legality. *That is practically what respondent's counsel say to this Court on the present appeal.*

The only difference is that, counsel argue that these papers necessarily constitute the agreement, although the evidence shows the *reality* underlying the printed form.

We deem it proper at this point, however, to correct a misleading reference to McAndrew's testimony in respondent's brief at page 15. It quotes the latter as saying that "he never negotiated a loan", and argues therefrom that his testimony as to negotiating the loan in question must be untrue. A reference to the record (R., 238) shows that this answer was in reply to a question as to what *other* firms he had negotiated with *"besides"* respondent.

We believe that a reading of all the testimony would show that on the material points McAndrews' testimony is consistent and corroborated by the probabilities.

The record shows that he was drawn into the matter only because his employer Coccaro wanted to avoid paying a commission to Surprenant (R., 195), which endeavor was defeated by Cosgrove's insistence that he would make the loan only upon condition that a "commission" was paid to Surprenant.

The documentary evidence shows that he took *some* part in the transactions, as his signature appears upon Exhibit "B", which he signed at respondent's office in Philadelphia on November 8th, 1919 (R., 190-191). The admissions of the respondent's Secretary, Cosgrove, on cross examination, and the terms of its advertisement, all tend to show strongly that what both parties really *intended to do* and *did*, was to arrange to lend and to borrow money, respectively.

Without repeating the testimony on this point, quoted in our main brief (pp. 4, 5, 26, 27, 28, 33, 34 and 35), we submit that there *was* evidence before the jury which the Circuit Court of Appeals could not disregard.

POINT III.

The cases cited by respondent to support its contention that, as matter of law, there was no usury in the transaction under review, even if construed as a loan of money, are clearly distinguishable.

In all the cases we have examined, it is said that if the parties intended a loan of money, the

usury statute was applicable, and it was left to the jury as a question of fact to decide if such a loan of money *was* intended.

Once respondent concedes that the transactions in question constituted loans of money, its argument becomes untenable. The cases it relies upon in support of this argument are all cases which proceed on the theory that *no loan of money was intended;* that the parties had some *bona fide* business relations requiring financial transactions, *not* intended as no loans of money.

Thus, in *Orvis* v. *Curtis* (157 N .Y. 657), pages 18 and 19 of respondent's brief, the parties were *partners*, sharing profits according to the amount of capital invested; and it was held that the usury statute did not apply to dealings between *partners*, because there was really no loan intended, but an adjustment of equities.

In *Brown* v. *Robinson*, 224 N. Y. 301 (Respondent's Brief, p. 19), there was an actual purchase of a contingent interest of the plaintiff's *cestui que trust* in the estate of his mother. There was no agreement on the part of the *cestui que trust* to repay any of the advances made to him, and the purchaser risked the hazard of loss of the entire price paid, in case of the death of the principal. The decision, therefore, went off upon the doctrine anciently established in *Bedingfield* v. *Ashley*, Cro. Eliz. 741, that, to constitute usury, there must be an agreement to repay absolutely and in all events and the purchase price, to constitute a *loan*, must not be subject to defeat by any hazard.

In *Ryttenberg* v. *Schefer,* 131 F. R. 313, decided in the District Court, a commission house acted as *factor* for a business house.

Holt, *J.,* said:

> "Schefer, Schramm & Vogel guaranteed the consignments, and permitted Radon & Co. to have the benefit of the name and credit of their house under the arrangemeat made. The contract was a genuine business arrangement, of mutual advantage to both parties, and not a mere cloak to cover usury."

In *Title Guarantee & Surety Co.* v. *Klein,* 178 F. R. 689, C. C. A. Third Circuit, an obligation for the payment of money (*i. e., not the lender's own note,* but United States Government 3% bonds), were sold, with an agreement to redeliver. The Court said:

> "The United States bonds that were the subject of this loan * * * were subject to fluctuation and for that reason among others *were not to be regarded as a loan of money."*

The theory on which that transaction was sustained is inapplicable to the case at bar; for there could be no "fluctuation" in the value of respondent's own note. * * * At maturity, it had to be paid in full, and respondent would then be in the same situation whether it "loaned" or delivered to a borrower, in the first instance, its note, its check or its cash.

In *Meeker* v. *Fiero,* 145 N. Y. 165, a loan had long since been made with a mortgage for security. The borrower desired the lender to surrender the security and take another security in place for it, and the Court held that this was

> "simply a change of security for an existing debt and that S—— could lawfully demand compensation for assenting to the transaction."

In the case at bar (as Clarke, *J.,* pointed out in *Hooley* v. *Talcott*), there were no dealings between the parties except an attempt to borrow and to lend money.

Nor was it any part of petitioner's case to show "corrupt" intent, if that expression be taken to mean immoral or wrongful purpose.

> *Bank of Salina* v. *Alvord,* 31 N. Y. 473;
> *Fiedler* v. *Darwin,* 50 N. Y., at page 443,

where the Court stated:

> "The intent which enters into and is essential to constitute usury is simply intent to take or reserve more than 7% (the statutory rate when that opinion was handed down) per annum for loan of money."

POINT IV.

Respondent's argument that its "commission" represents actual services rendered overlooks the testimony to the contrary in the record.

At page 27 of respondent's brief, it seeks to parallel this case with *Righter* v. *Cowgell,* by suggesting certain alleged services for which the one quarter of a per cent. per month was actual compensation. In that case (quoted in our brief at p. 25), respondent "had considerable trouble" with the goods. The argument based on respondent's alleged actual services, in the present case, overlooks the testimony of its own witness Cosgrove (R., 129):

> "Q. And you did not do any additional work with respect to them, and you did not render any services with regard to taking care of the merchandise? A. No, I would not say that we did.
>
> Q. That is what the warehouse was paid for. A. Exactly.
>
> Q. With regard to the care or custody of the merchandise, I mean. In this transaction, there is a statement of $30.40 paid as commission for its responsibility and services as above in advance of credit? A. Yes.
>
> Q. Would you say that was for the advance of credit? A. It was, in this particular instance.

> Q. There were no other services in regard to taking care of the merchandise? A. There were not in any of Coccaro's cases."

As Justice Clarke aptly pointed out in *Hooley* v. *Talcott* (see our brief, p. 38), this commission was a fixed percentage of one quarter per cent, a month for the amount loaned, irrespective of renewals, and regardless of whether there were any appraisals.

Respondent, at page 25 of its brief, suggests that we are under a misapprehension in believing that their "warehouse" is "a new scheme of corporation", since it has been in business fifty years. On the contrary, as we pointed out in our original brief (p. 14), we consider respondent's plan for loaning money a mere vestigial remainder, all similar devices having long since been abandoned in New York.

At page 31, exception is taken to our statement at page 9 that S. B. Lewis & Co. *"bought"* any of respondent's notes.

The evidence is that in at least one instance S. B. Lewis & Co. drew their *own* check (R., 154), exchanged it for a cashier's check on their own bank (R., 154) and delivered it to respondent in exchange for its note (R., 155). Thus, S. B. Lewis & Co. not only made a broker's commission (R., 156), but also interest until the date it rehypothecated the note (R., 156, fol. 199), and any profit if they sold it at a more favorable discount rate, for they did not inform respondent what bank they *"sold* the paper to" (R., 158). It seems to us that this record amply justifies our assertion at page 9 of our brief that *"Lewis bought the draft"*.

POINT V.

Respondent's suggestion that any "independent" investigation of collateral was made by it in Philadelphia is without basis in the record. The admissions of its Secretary show that the "deal was closed" in New York, and the New York statute applies.

At page 31 of its brief, respondent likewise seeks to "correct" our statement (our brief, p. 28, items 9-12), that Cosgrove made his investigation in the trade in New York, and says "the evidence does not support this contention", without quoting or analyzing the "evidence" which they have in mind. We have printed all the evidence on this point in our brief at pages 33-35. Cosgrove clearly said (R., 76) that his inquiry was to be made by him "*that day*" (*i. e.*, the day of the conversation), and that *upon his return* to Philadelphia the *next day*, the note would issue. He took the documents to Philadelphia and *in the meantime* had made his inquiry. The *next* thing that happened was that on the morning following, the note was issued (R., 77).

Respondent seeks to "correct" this clear statement of its own witness to mean that some of its other officers or employees made independent inquiry in Philadelphia. It quotes no evidence to sustain the suggestion, and there *is* none. It is fair to assume that none could be adduced, else Cosgrove or whoever else made such inquiry,

would have testified to it. This observation is especially apposite in view of the unnecessarily exhaustive and meticulous detail of the proofs presented by respondent. In view of this state of the record, we believe the Court will be justified in accepting the statement in our original brief that the deal was *closed* when Cosgrove left New York.

CONCLUSION.

Petitioners submit that none of the cases cited in respondents' brief is authority for the contentions upon which they rely, and that the argument outlined in petitioners' brief has not been met.

We therefore submit that the Circuit Court of Appeals was in error in reversing the verdict of the jury and that that verdict should be reinstated. In that way only can the error of the Circuit Court of Appeals in reversing the decision of the jury after its full and fair hearing of the facts on the merits, be corrected.

Respectfully submitted,

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